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Trustrecht en bewind

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BRIEF ACCOUNT

The purpose of the foregoing study, the method followed and the conclusions arrived at.

This book contains a comparative study of Anglo-American trust law. It is inspired by the proposition that this „greatest and most distinctive achievement of Anglo-American law”¹ might hold some elements which could be useful or even indispensable for the growth of Dutch law. The background of this proposition is revealed in Chapter I: there exists in Dutch law a number of trust-like schemes which cannot satisfactorily be explained on the basis of the ordinary Civil Law concepts. So there are the devices of *executele* and *bewind*, the former comparable to executorship, the latter generally to a spendthrift trust, and sometimes to an ordinary trust to secure future interests. There are trustees acting for bondholders and committees doing the same. There are, furthermore, the devices of the *administratie van effecten*, often comparable to the voting trust, and of the *effectendepôt*, comparable to the investment trust in its strict trust-form. There is also the transfer of copyrights, commonly performed by composers, in order that the transferee may exercise those rights for the benefit of the transferring composer. And finally a device may be mentioned, that is comparable to a common-law assignment for the benefit of creditors.

Considering these devices as specimens of agency, as it is used in the case of *bewind* and *executele*, Civil Law has never been able to explain sufficiently the independent position held by the „agent”. That is why these pseudo-agency devices, both of them derived from the old German *Salmann* or *Treuhand* relation and formerly of the greatest importance, have been minimized by Continental legal science, which has succeeded in putting

¹ After F. W. Maitland, *The unincorporate body*, Selected Essays (1936), 128 ff., 129.

them in a secondary position. Recently however a tendency can be observed in legal science, which questions this development and strives to restore *bewind* and *executele* to some of their former glory.

Considering some other trust-like schemes as giving full ownership to the trustee, Dutch law is unable to safeguard the „trust property” against the creditors of the trustee, which, nevertheless, it would like to do, if it could only find a satisfactory theoretical explanation, and which even now some lawyers are ready to do without a satisfactory, or even without any explanation.

The situation just described is a serious one, much more so in a Civil Law system than it would be in a system of Common Law, the former being much more attached to and based on abstract theoretical reasoning and constructions than the latter. Without a satisfactory theoretical foundation the different schemes just mentioned will therefore be unable to grow up — or, as in the case of *bewind* and *executele*, to recover — safely and soundly. The gravity of the situation is furthermore emphasized by the fact that a new Dutch Civil Code, in which, among other things, it is intended to lay out a better foundation for the development of the existing trust-like schemes, is in the process of being drafted. Who then, in the light of the circumstances just described, can be astonished that a Dutch lawyer should turn to a comparative study of Anglo-American trust law, and in effect of American trust law in particular. This preference for American trust law can be explained by the fact that former Dutch students of Anglo-American trust law have concentrated mainly on the English trust law, whereas in America the development of the trust was given new impetus by the American business spirit as well as by the efforts of American legal science. As for the scientific developments of trust law, one has only to mention the authoritative works of Bogert, and Scott, and the American Law Institute's Restatement of the Law of Trusts. These are the three sources, from which I have drawn my knowledge of American trust law; these I also refer to instead of to the actual cases, except when I am citing a special case. This is submitted to be more practical than to cite cases published in reports which are not available in Europe. Moreover, where the three modern pillars of American trust law

just mentioned agree about the state of the law — which they generally do as far as the points discussed in this treatise are concerned — it seems to be sufficiently safe for an outsider to accept their interpretation of the law.

Observations made with regard to the origin of the difficulties caused by the existing trust-like schemes, lead us in Chapter I §§ 3 and 4 to the proposition that the concept of dual ownership, forming the nucleus of Anglo-American trust law, might constitute exactly the theoretical element, needed by Dutch law to supply these schemes with a satisfactory theoretical foundation. Our main objective then becomes to answer the question whether it would be possible for Dutch law to introduce this concept of dual ownership as a basic element of a new Dutch legal doctrine, which in the following chapters is referred to as the „Dutch trust law”.

The method in which the foregoing study is conducted is determined by a word of Pound: „It is not the function of comparative law to furnish us with ready made rules to be taken over from the corpus of one system and embodied in another exactly as they stand. Rather it may furnish us an important mass of raw material for creative law making, and afford us a critique of rules and technique and received ideals, when a period of transition requires us to take stock of our legal armory and see how far our weapons are equal to their tasks in a new economic order”¹. When a Dutch lawyer sits down to study Anglo-American trust law, he finds his subject interwoven with the entire Common Law system and its legal concepts; such is the aspect of the raw material mentioned by Pound. This study tends to analyse Anglo-American trust law, isolating it from the adjoining Common Law doctrines, in order to lay open the essentials of trust law. This however is far from easy. David, excellent French student of Anglo-American law, was right when he wrote that the French lawyer who wants to study the Common Law system, has to forget everything he ever learned²; it is a statement that also applies to the Dutch and probably to the Civil Law lawyer in general, who wants to study a subject of

¹ R. Pound, *Revival of comparative law*, 5 *Tulane Law Review* 15 (1930).

² R. David (avec la collaboration de H. C. Gutteridge et de B. A. Wortley), *Introduction à l'étude du droit privé de l'Angleterre* (1948), 200.

Anglo-American law. Indeed, at first this Anglo-American system seems to be a labyrinth, in which the Civil Law lawyer gets lost entirely. Before entering upon a study of trust law therefore, it is believed to be indispensable for the Civil Law lawyer to orient himself about the structure and about the fundamental legal concepts of the Common Law. The results of such orientation have been laid down in the second chapter, which thus contains a general introduction to Anglo-American and in particular to American law.

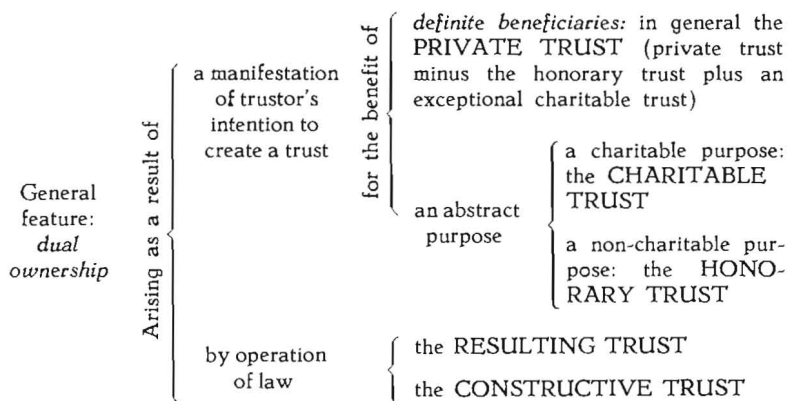
Intending thereafter to embark upon our study of Anglo-American trust law, we find that the word „trust” is used in a confusing multitude of senses. Chapter III therefore tends to give some clarification on the different meanings of the word „trust”, considering such concepts as the industrial trust, as trust business (defined by the American Bankers Association as „the business of settling estates, administering trusts and performing agencies in all appropriate cases”¹), or as the investment trust in its general sense, denoting all investment enterprises; mentioning furthermore some rather loose meanings of the word „trust”, with regard to fiduciary relations in general, or in connection with contracts for the sale of real property; and referring finally to the use of the word „trust” with regard to holders of public offices and to trusteeship in international law.

The next chapter, chapter IV, is used to make some distinctions in the wide field of trust law, describing the trustform with which we are to deal, i.e. the express trust for the benefit of definite beneficiaries. It is submitted that in a study like this one, which has to deal with the theoretical background of the trust, the distinction between trusts for the benefit of definite beneficiaries and those serving an abstract purpose, is preferable to the common distinction between private and charitable trusts. It is argued that, since there are charitable trusts for the benefit — at least in the first instance — of a definite beneficiary (a trust for the benefit of a charitable corporation, which is to use the trust property to promote its general purposes²), and since on the other hand courts generally tend to recognize private trusts without such beneficiaries (the honorary trust), the common state-

¹ A statement of principles of Trust Institutions, art. 1 s. 2 (1933).

² In the example given one may distinguish two trusts: The first one: A to

ment that a private trust serves definite beneficiaries and that a charitable trust does not, is only an approximation without scientific exactness. The following scheme is suggested to clarify the position of the trust for the benefit of definite beneficiaries:



In chapter V (the creation of the trust), VI (the trustee), VII (the beneficiary), VIII (the trust-res), IX (the termination of the trust), and X (the application of the trust) we embark upon our objective, the development of an analysis of our „raw material”, the Anglo-American and in particular the American trust for the benefit of definite beneficiaries. This analysis of Anglo-American trust law is developed for the purpose of seeking elements which might be helpful in erecting an acceptable foundation for the trust-like Dutch devices mentioned above. This objective has determined the approach followed; any time a fragment of Anglo-American trust law is studied, the phenomena attracting our attention have been determined by this objective; at frequent intervals, the analysis of Anglo-American trust law is interrupted in order to „apply our critique”, going into the question whether a rule similar to the one we are studying would fit in the Dutch legal system. On several occasions it is submitted

T for the benefit of the charitable corporation. And the second one: The beneficial interest is given in trust to the charitable corporation for the benefit of certain charitable purposes. Cf. Bogert, *Trusts and Trustees*, section 362. Now it is undeniable that the ultimate, the real beneficiaries of the whole scheme are those of the second trust. And those, no doubt, are indefinite. But it is equally undeniable that in the first trust there is a definite beneficiary, though only as an intermediary: the charitable corporation.

that differences in the adjoining doctrines should result in differences between Anglo-American trust law and the proposed „Dutch trust law”, which latter therefore could not be identical with the former. It could for instance not accept the doctrine of the unilateral creation of a trust *inter vivos*, which the American trust law seems to adhere to¹, but it would have to construe this creation as a bilateral act; the rules set by the Statute of Frauds, being construed as rules of evidence, should be replaced by rules conforming better to the Dutch system of publicity with regard to real property. In fact, transfer of a beneficial title to real property should be recorded just like transfer of the legal title. Important differences in the law of future interests, and in the law of estates in general, would have major consequences for Dutch trust law. It is submitted that in this trust law the doctrine of present and future interests should generally conform to the concepts prevailing in this regard in the other fields of Dutch law. Moreover, the duality of jurisdiction, lying in the coexistence of Common Law and Equity, duality which forms the historical background of Anglo-American trust law, and which, in spite of modern fusion between Common Law and Equity, still marks the theoretical explanations given of the phenomenon of dual ownership, could not be transplanted into Dutch law, which has never known such dual jurisdiction. Some reasoning is required to answer the question whether this concept of dual ownership, not resting on a dual jurisdiction and construed in terms of Civil Law concepts, can be incorporated into Dutch law. It is sufficient to say, that the answer is given in the affirmative: our conclusion is, that by legislative action the concept of dual ownership, basic element of Anglo-American trust law, could be introduced into Dutch law, thus constituting the nucleus of a new Dutch legal doctrine, the Dutch trust law; which Dutch trust law however, as seen above, would not be identical with Anglo-American trust law. These conclusions are summarized in chapter XI, the final chapter, which continues by illustrating that the different trust-like schemes could easily be brought home in the proposed Dutch trust law and that some of the principal difficulties, referred to in chapter I, would thus be solved.

¹ Rest. s. 35, 36.